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No. 88-2023

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD R. ELLIS,
Petitioner,

vs.

HENRY L. MUMFORD and EDWARD CAVANAUGH,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JULIUS F. PARKER, JR.
(Counsel of Record)
PARKER, SKELDING, LABASKY & CORRY
Post Office Box 669
318 North Monroe St.
Tallahassee, Florida 32302
(904) 222-3730
Attorneys for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-8030

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QUESTIONS PRESENTED FOR REVIEW

WHETHER THE UNITED STATES SUPREME COURT SHOULD REVIEW BY CERTIORARI AN UNPUBLISHED PER CURIAM AFFIRMANCE BY A COURT OF APPEALS, WHICH THE COURT OF APPEALS HAS DETERMINED WOULD HAVE NO PRECEDENTIAL VALUE, AND WHICH SIMPLY HOLDS THAT FINDINGS OF FACT BY THE DISTRICT COURT ARE NOT CLEARLY ERRONEOUS.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Richard R. Ellis, and the Respondents, Henry L. Mumford and Edward Cavanaugh. William Freeman, Jr. was a Defendant in the District Court but was not a party to the appeal. Since he was not involved in the appeal, he is not named as a party herein.

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STATEMENT OF THE CASE

The Complaint was filed in this action on May 4, 1986, seeking both compensatory and punitive damages. On January 16, 1987, a pretrial - settlement conference was held in Miami before United States Magistrate Charlene H. Sorrentino.

As set forth in Magistrate Sorrentino's Report and Recommendation with regard to attorney's fees:

> An offer of settlement by the Defendants in the range of $10-15,000.00 was turned down by counsel for the Plaintiff *at a formal pretrial-settlement conference before the undersigned on January 16, 1987.* The undersigned reviewed the facts revealed by extensive discovery at the time of the conference and urged Plaintiff's counsel to accept what in her view was a more than fair settlement offer. An affidavit by defense counsel with supporting exhibits reveals that settlement in the amount of $10-15,000.00 was again offered to Plaintiff's counsel on February 3, 1987. The offer was refused. (Emphasis supplied)

Following a three day jury trial, the jury returned a verdict in favor of the Plaintiff in the total amount of $3,500.00 in compensatory damages and $0.00 in punitive damages. Counsel for the Plaintiff then sought attorney's fees of $50,000.00 plus costs in the amount of $11,004.97. The United States Magistrate, by Order dated February 29, 1988, recommended attorney's fees in the total amount of $3,500.00 and costs of $534.17. The District Judge, the Honorable Lenore Nesbitt, on de novo

review of the Magistrate's Report and Recommendation, affirmed the Magistrate's Report and Recommendation and found in her Order that:

> There is no dispute that counsel for the Defendant offered to settle the case for $10,000 to $15,000 at a pretrial-settlement conference before the Magistrate and by a letter to counsel for the Plaintiff on February 3, 1987.
>
> The Offer of Judgment was sufficiently certain and made *in open court* at a settlement conference so that the spirit and intent of Rule 68 was met. In any event, Plaintiff's counsel flatly refused the offer and counter-offered the amount of $45,000, including attorney's fees. Therefore, it was proper for the Magistrate not to consider any costs incurred after the making of the offer in accordance with the "penalty" provisions of rejecting an offer of judgment pursuant to Rule 68. (Emphasis supplied)

District Judge Nesbitt further held in her Order of April 29, 1988 that:

> Counsel for the Plaintiff demonstrated little skill in negotiation as he approached a resolution of the case as a "hard liner" which is an outdated "trench warfare" view of the role of settlement in modern day litigation.

Plaintiff appealed not from the Judgment in his favor of $3,500 but from the award of attorney's fees. The Eleventh Circuit Court of Appeals affirmed without opinion pursuant to Eleventh Circuit Rule 36-1 and subsequently denied Plaintiff's Motion for Rehearing.

REASON FOR DENYING THE WRIT

The Per Curiam Affirmed Decision Of The Eleventh Circuit Has No Value Whatsoever As Precedent, Decides Only The Rights Of The Parties To This Litigation, And Holds That Findings Of Fact By The District Court Are Not Clearly Erroneous

Eleventh Circuit Rule 36-1, entitled Affirmance Without Opinion, provides in pertinent part as follows:

> When the Court determines that any of the following circumstances exist:
>
> (a) Judgment of the district court is based on findings of fact that are not clearly erroneous;
>
> * * *
>
> (e) Judgment has been entered without an error of law;
>
> and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

The District Court made two findings of fact. The first was by the Magistrate who actually conducted the settlement/pretrial conference. Her Order made the following finding of fact:

> An offer of settlement by the defendants in the range of $10-15,000.00 was turned down by counsel for the Plaintiff *at a formal pretrial-settlement conference before the undersigned on January 16, 1987.* (Emphasis supplied)

The District Judge, in her Order adopting the Magistrate's Report and Recommendation, made the following finding of fact:

> *There is no dispute* that counsel for the Defendant offered to settle the case for $10,000.00 to $15,000.00 at a pretrial-settlement conference before the Magistrate and by a letter to counsel for the Plaintiff on February 3, 1987. (Emphasis supplied)

The Eleventh Circuit, pursuant to its Rule 36-1, has determined that the Judgment of the District Court is based on findings of fact that are not clearly erroneous and/or that the Judgment was entered without an error of law. The per curiam opinion is of no value whatsoever as precedent, decides only the rights of the parties to this specific litigation, and holds that findings of fact by the District Court are not clearly erroneous. The Court denied Petitioner's Motion for Rehearing which requested that the Court write an opinion. The Court has determined that an opinion would be of no precedential value and the per curiam affirmance is not now, nor will it ever be published.

The Petition for Certiorari not only should be denied but is patently frivolous.

A per curiam affirmance without opinion and unpublished cannot serve as the basis for a conflict certiorari jurisdiction, nor does it decide any important question previously undecided by circuit courts of appeal or by the United States Supreme Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JULIUS F. PARKER, JR.
(Counsel of Record)
PARKER, SKELDING, LABASKY
& CORRY
Post Office Box 669
318 North Monroe St.
Tallahassee, Florida 32302
(904) 222-3730
Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of this Brief of Respondents have been furnished by United States Mail to Philip C. Gildan, Esquire, Nason, Gildan, Yeager & Gerson, P.A., Post Office Box 3704, West Palm Beach, FL 33402 on this 7th day of July, 1989.

JULIUS F. PARKER, JR.